No. 3472

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Smith-Booth-Usher Company,
Plaintiff in Error,
vs.
Detroit Copper Mining Company of Arizona,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

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This is a writ of error directed to the United States District Court in Arizona to renew the proceedings and judgment entered in said United States District Court on the 28th day of January, 1914, upon a verdict directed by the learned court below at the close of plaintiff's case in favor of the defendant and against the plaintiff.

STATEMENT OF FACTS.

On the 5th day of December, 1912, the Detroit Copper Mining Company of Arizona (hereinafter called the "defendant") entered into a written contract with the Smith-Booth-Usher Company (hereinafter called the "plaintiff"). By the terms of this contract the

plaintiff undertook to furnish to the defendant three 200 horsepower International Amet Crude Oil Gas Producers as shown on the cut in the manufacturer's bulletin attached to the contract and in accordance with certain specifications set forth in the contract. The machinery was to be as described in the manufacturer's bulletin, or of the latest improved design. The shipment was to be made from Los Angeles and the delivery was to be at Morenci, Arizona, where the defendant's plant is located. The defendant was to pay plaintiff ten thousand dollars with interest at six per centum from date of erection upon the completion of the 90 days' trial provided for by the contract should the apparatus meet the guarantees specified, or at any time prior to the end of the 90 days' trial should the defendant so elect [Exhibit A, p. 317].

The purpose of the machinery as its name indicated, was to produce gas from crude oil. It consisted of three principal units, each of which had no connection with the others, except that all furnished gas into the same main [p. 14]. These units, with the oil pump, constituted the entire machinery which the plaintiff was to furnish under the contract. In order to complete this gas producing plant the defendant was to furnish a 15,000 cubic feet gas holder and the auxiliary machinery, including pipes and mains [Exhibit A, p. 320].

The apparatus was shipped from Los Angeles the latter part of February, 1913. At the request of defendant the plaintiff's erecting engineer, Lawrence Vorhees, went to Morenci about March 8, 1913, and

superintended the erection of this machinery [p. 140]. The plant was erected about March 27, 1913 [p. 152]. J. H. Cox, who was plaintiff's sales engineer, went to Morenci about April 2, 1913, and began the tests of this machinery pursuant to the contractual provision for a 90 days' trial [pp. 152, 154]. These tests were continued by Mr. Cox until about May 7, 1913, when with the consent of defendant he left Morenci, pending the purchase of a new washer for the machinery, with the intention of returning and continuing the tests on behalf of the plaintiff [pp. 169-192]. However, on May 28, the defendant advised the plaintiff that the defendant would go no further with the tests under the contract, though as a matter of fact only a little over one third of the 90 days' trial had been allowed the plaintiff [pp. 191, 275-6]. The defendant refused to continue with the contract and refused to pay for the machinery [pp. 191-2].

On July 17, 1913, plaintiff filed its complaint herein. This complaint counted on the written contract alleging performance by plaintiff and breaches by defendant in failing to supply a large gas holder and in refusing to go on with the test or pay for the apparatus. The complaint also contained a plea for recovery on the common count. The summons was served herein on the plaintiff on July 27, 1913, and the answer filed August 11, 1913.

SPECIFICATION OF ERRORS.

Plaintiffs in error contend that the learned court erred in the following respects:

1. In determining all questions of fact presented by the plaintiffs in error; in not allowing these issues to be passed upon by the jury and in instructing the jury as follows: "Gentlemen of the jury, you are instructed in this case to return a verdict in favor of the defendants." [Transcript, p. 304.]

2. In excluding evidence offered by plaintiff in error tending to show that the effect of gas similar to that produced in the plant in question upon gas engines and pipes similar to those used by defendant in error was not injurious in other plants.

3. In excluding the evidence of qualified experts offered by plaintiff in error tending to show the performance of the contract by the plaintiff in error.

4. In excluding evidence offered by plaintiff in error tending to show the reason for the departure of plaintiff in error's engineer from the plant prior to the expiration of the ninety days' trial of the machinery provided for by the contract and tending to show that such departure was entirely in harmony with and not a breach of the contract sued upon, but was in effect a breach of said contract on the part of defendant in error.

5. In excluding evidence offered by plaintiff in error tending to show the result of the tests to determine the quality of the gas produced by the plant in question and to show that on such tests the gas fully met the guarantees contained in the contract.

6. In excluding expert evidence offered by the plaintiff in error tending to show that the suspended matter contained in the gas produced by the plant in question was not injurious to the engines or gas conducting pipes of defendant.

7. In admitting evidence introduced by defendant in error purporting to show the intention of the parties to the contract outside of the contract itself.

8. In excluding evidence offered by plaintiff in error of conversations of plaintiff in error's engineer with the employees and officers of defendant in error who were authorized to bind defendant in error.

9. In admitting evidence introduced by defendant in error purporting to show that the gas holder provided by the terms of the contract to be furnished by defendant in error was larger than necessary for the operation of the plant in question and that the smaller holder actually furnished by defendant in error was of a sufficient size to operate the plant.

10. In excluding testimony offered by plaintiff in error tending to show the limits of the authority of plaintiff in error's engineer and his lack of authority to bind the plaintiff in error or to modify the contract sued upon in this action.

11. In excluding testimony supporting the second cause of action contained in plaintiff in error's complaint, which testimony tended to show the reasonable value of goods, wares and merchandise sold and delivered to defendant in error.

12. In denying the motion of plaintiff in error for a new trial.

POINTS.

I.

The Court Erred in Directing a Verdict by the Jury at the Close of the Plaintiff's Case in Favor of Defendant, in Determining All Questions of Fact Presented by the Evidence, and in Not Allowing these Issues to be Passed Upon by the Jury.

At the end of the plaintiff's case on motion of the defendant, the learned court below instructed the jury to return a verdict in favor of defendant [pp. 298-304]. This the jury did.

A plain issue of fact was presented by the proof even upon the evidence admitted and without the evidence erroneously excluded. This proof should have been submitted to the jury. Instead the court decided these issues himself and not only decided them but decided them erroneously.

The machinery was erected about March 27, 1913, by Mr. Vorhees, who was plaintiff's erecting engineer [p. 152]. Vorhees did not conduct the tests provided for under the contract, but remained as operating engineer under Mr. Cox until the latter part of April, when Mr. Canning took his place as operator [pp. 150, 154-5].

The machinery as installed consisted of three 200 horsepower units International Amet Crude Oil Gas Producers [pp. 141, 166]. Each unit was 24 inches wide, 24 feet long and about nine feet high. They were erected side by side, but had no connection with each other except in so far as they all furnished gas into the same main [p. 141]. The process of producing gas

in each unit is briefly this: The oil is fired and the resulting gas mixing with the air goes through combining tubes into the washer [p. 163]. The washer consisted of an horizontal tank 7 feet long filled with water. Across the width of the washer ran a diaphragm or horizontal plate [p. 143]. The gas goes through this washer under the diaphragm mixing with the water and then rises at the end of the washer [p. 164]. The water and most of the lamp black produced by the ignition of the oil is at this point discharged out of the producer. The gas goes on through a vertical washer or, as it was more frequently called at the trial, scrubber, erected on top of the horizontal washer [p. 164]. This scrubber was equipped with wash trays of lattice work and a water spray, through which the gas passed, being thus subjected to a further cleansing [p. 164]. The gas then discharged into a header, or pipe, and from there went through the gas main into a holder which was approximately three hundred feet away from the units [p. 142].

The holder consists of a tank with water and an inverted tank inside which rises as the gas goes in [p. 142]. This holder has several functions. It keeps an even pressure upon the pipe line system and the plant. It allows the components of the gas to come to rest at a low velocity and to thoroughly mix. It acts as a storage tank creating a reserve to keep the engines running during the burn-out periods required by the system [pp. 155, 237, 268]. The holder is also used to measure the quantity of gas made [pp. 169, 186, 235,

272]. Finally, and most important, the holder allows the gas to rest and any lamp black or suspended matter the gas may contain to settle at the bottom of the holder [pp. 143, 156, 205, 293].

After leaving the holder, the gas was to go through pipes and operate the defendant's machinery which was approximately at about one thousand feet from the units [pp. 151, 214].

Under the contract all the plaintiff had to do was to furnish the three 200 horsepower Amet Crude Oil Gas Producers and an oil pump [pp. 141-4, 6]. The piping, blower and water pump were to be furnished by the defendant [p. 320]. The defendant undertook also to furnish a 15,000 cubic feet holder [p. 320].

When Mr. Cox arrived at Morenci on or about April 2, 1913, to conduct the 90 days' test of the gas plant on behalf of the plaintiff he found the machinery which was to be furnished by the plaintiff under the contract completely installed in accordance with the plans and specifications [pp. 166-7]. The only change from the specifications was that instead of installing a vertical washer or scrubber they installed both a vertical and an horizontal washer or scrubber [pp. 155, 158, 291]. This was fully within the contract as the 90 days' test was evidently agreed upon in order to enable plaintiff to make such adjustments and changes as might be necessary to attain the results provided for by the contract, and the contract itself provided that the plant should be as described in the manufacturer's bulletin attached thereto or of the latest improved design. In this connection the wording of the

third guarantee is also to be noted: "It is understood and agreed that *any machinery* which the company may furnish," etc.

There is no question as to the installation of this machinery in accordance with the contract as far as the plaintiff was concerned. The proof to that effect was ample [pp. 143-5, 151, 152, 154-6, 157, 158, 166-7, 185, 193, 194]. The material and workmanship were of the first class [pp. 151, 193-4]. Indeed, the court, in his opinion does not seriously question that the machinery was completely installed from the physical point of view. Plaintiff furnished plans and specifications and an operating engineer in accordance with the contract [pp. 151-2]. The defendant waived all question of delay in shipment [pp. 148-9]. The court decided that "the question is whether or not the plaintiff did meet all the guarantees specified in the agreement [p. 299]. We submit that this question is not thus fairly stated by the learned court, as it must be necessarily modified by defendant's failure to provide plaintiff with a 15,000 cubic feet holder for the purposes of the 90 days' test, and by defendant's refusal to allow plaintiff to continue with the tests after only a little more than a third of the time specified in the contract had elapsed, all of which was duly pleaded. However, we shall consider the evidence in the first place from the point of view of the issue as thus stated by the learned court, namely, whether the proofs show that the machinery operated in accordance with the contract.

The main question to be considered in this connec-

tion is whether the gas produced by this machinery met the provisions of the contract with regard thereto. It is true as pointed out by the court in his opinion that at the beginning of the test Mr. Cox found that the lamp black produced by the ignition of the oil would pile up in the producer at the point where the gas passed from the horizontal washer to the vertical scrubber [p. 166]. This clogging was not, however, as significant as the court seems to think [pp. 300-301]. In the first place it was contemplated by the very contract provisions for a 90 days' test that there would be at first some things requiring adjustment, and accordingly changes were made by Mr. Cox which very quickly got rid of this trouble [pp. 165-8]. These changes and those necessitated by the unsteadiness of the firing and the blowing out of gaskets in the producers took about eight or ten days [p. 167]. Furthermore, this cloging of the lamp black was not, as stated by the court, in the defendant's gas pipes, but as specifically stated by Mr. Vorhees and corroborated by Mr. Cox, in the washers of the units [pp. 154, 166, 300]. This error of the court's is an important one, and it might well be that it had a determining effect in leading the court to direct a verdict for the defendant. For if the proof on this point had been as stated by the court it might well have the effect of an admission by the plaintiff that the gas produced by its machinery did at one time clog defendant's pipes. In view of the fact, very apparent from reading the opinion, that the court continuously overlooked that the plaintiff had a 90 days' test within

which to make adjustments and the further fact that the court held that the proof showed that the pipes would be clogged by the lamp black in the gas, the importance of this error is evident [pp. 302-3].

After Mr. Cox had made the changes the amount of lamp black in the gas was greatly reduced. While it was true that after the changes, there still existed some lamp black in the gas as it left the producer, nevertheless it had been reduced to a minimum and the gas was not only fitted for the purpose for which it was to be used, but it met the requirements of the contract [pp. 204, 266].

The court lays much stress in his opinion on the existence of this suspended matter [p. 301]. We respectfully submit that the learned court has failed to take several important facts into consideration. In the first place, the contract does not require that there should be *no* suspended matter in the gas when it reaches the engines it was to operate. The requirement merely was that there should be no suspended matter in the gas which *would be injurious to the engines or gas conducting pipes of the defendant* [p. 319]. Mr. Cox, whose qualifications as an expert were admitted by the defendant, testified that the small amount of suspended matter in this gas would have no injurious effects on the defendant's engines or pipes [pp. 204, 208]. The court, indeed, ruled that plaintiff could not show that in other plants under exactly similar conditions to the one in question the suspended matter in the gas had no injurious effect on the engines [pp. 208, 285-7]. However, Mr. Ensign, who invented this gas producer, tes-

tified that so far from having an injurious effect on the engines or pipes the suspended matter would be consumed as fuel and would add to the economy of the plant [p. 295]. There is nothing to contradict this evidence in the record.

The court, however, in his opinion lays great stress on the admission by Mr. Cox that the suspended matter in this gas *might* after a period cause the pipes to become clogged, unless they were sluiced or cleaned [pp. 204, 301]. Mr. Cox did not state what the period would be, but testified that the cleaning could be done without closing down the plant [p. 189]. Mr. Ensign corroborated this [p. 295]. MR. ENSIGN ALSO TESTIFIED THAT AT YUMA THE SAME KIND OF PRODUCERS UNDER SIMILAR CONDITIONS PRODUCED GAS WHICH CARRIED MORE LAMP BLACK BEFORE IT REACHED THE HOLDER THAN THE GAS PRODUCED BY THIS MORENCI PLANT, YET AFTER FOUR YEARS' RUN THE YUMA GAS DID NOT PRODUCE THREE INCHES OF LAMP BLACK IN THE BOTTOM OF THE HOLDER [p. 294].

It is to be remembered that one of the purposes of the holder was to allow the gas to come to a rest and the lamp black to settle out of the gas [pp. 237, 268]. The gas would, of course, not remain in the pipes any length of time. It is, therefore, obvious that it would be at least four years before there would be as much as three inches of lamp black in the bottom of the pipes. As the pipes were two feet in diameter, the likelihood of their being clogged with lamp black from this gas in any reasonable number of years is therefore very small [p. 226]. The plaintiff is clearly entitled to this deduction from the evidence.

"It is not a proper test of whether the court should "direct a verdict that the court in weighing the evidence "would, upon motion, grant a new trial. On the con- "trary it is the duty of a court when a motion is made "to direct a verdict to take that view of the evidence "most favorable to the party against whom it is desired "that the verdict should be directed and from that evi- "dence and the inferences reasonably and justifiably "to be drawn therefrom determine whether or not "under the law a verdict might be found for that "party."

Nelson v. Ohio Cultivator Company, 188 Fed. 620, 629.

It is obvious from a reading of the record that the clear inference from Mr. Cox's testimony was that the plaintiff had fulfilled all the requirements of the contract, but that if defendant wished to prevent any deposit at all in the pipes it could install a spraying or sluicing system to clean the pipes which could be operated without interrupting the operation of the gas plant [pp. 266-7]. Mr. Cox testified on cross examination: "No, I had not cleaned the gas so that it would not deposit in the pipes, it couldn't be done."

"Q. With the apparatus you had there it couldn't be done ? A. To clean it absolutely so that there would be no deposit in the pipes" [p. 265].

He also testified on cross examination: "My position was that I had made the proper kind of gas when I left Morenci, that I had made the kind of gas which I was required to make in accordance with the con-

tract when I left Morenci. *I was then merely offering to do something more than the contract required me to do"* [p. 266].

The fact that no sluicing apparatus was specified in the contract is of no significance in view of the testimony above referred to and the fact that the contract did not guarantee the non-existence of suspended matter in the gas. The part of the contract which is designated as the "Company Guarantee" governs on this question.

The learned court's erroneous conclusion that the contract provided that there should be no deposit in the pipes was evidently due to an inference made apparently at the suggestion of defendant's counsel from certain expressions contained in the "Manufacturer's Bulletin" attached to the contract [pp. 178-9]. This bulletin was *not* made a part of the contract. It is a printed document for general use and was not made expressly for this contract. The purpose of attaching this bulletin to the contract was very evidently because it contained cuts of the apparatus. This is clearly shown by the only reference made to the bulletin in the contract, namely, in the first part of the contract as follows:

"Three (3) two hundred (200) horse power, Inter-
"national Amet Crude Oil Gas Producers: lined com-
"plete with brick work and concrete, with all piping
"and valves as shown in cut on the first page of the
"Company's Bulletin hereto attached;"

and in the typewritten part of the contract under the heading "Company's Guarantee:"

"That it shall be as described in the manufacturer's

"bulletin attached hereto, *or of the latest improved de-*
"sign."

These references to the bulletin for this specific purpose did not adopt all the provisions of the bulletin. By in effect, holding that the existence of suspended matter in the gas was obnoxious to a compliance with the contract the court made for the parties a different contract than they had made for themselves [pp. 302-3]. A mere reference for one purpose to another document does not adopt it for all purposes.

In the case of Moreing v. Weber, 3 Cal. App. 20, reference was made in a contract to certain specifications for the sole purpose of showing that the grading was to be completed "in accordance with the plans and specifications therefor." The court in the above case, said:

"The rule seems so well established that it may be "said to be elementary, that where in a contract refer-"ence is made to another writing for a particular speci-"fied purpose such other writing becomes a part of the "contract for such specified purpose only and therefore "this writing, known as the 'specifications' can serve no "other purpose than to furnish the plans and specifica-"tions as to how the grading should be done and is for-"eign to the contract for the other purposes."

The following authorities support this principle:

Noyes v. Butler Bros., 108 N.W. 839; 98 Minn. 448.

Knickerbocker L. Ins. Co. v. Heidel, 76 Tenn. (S. Lea) 488, 497;

Riley v. Brooklyn, 46 N. Y. 444;
B. & O. Rr. Co v. Stewart, 79 Md. 487; 29 Atl. 964;
Young v. Borzone, 66 P. 135, 138, 421 (Wash.);
Harvy v. Radkey, 1 White & W. Civ. Cas. Ct. App. 277 (Tex.).

Moreover, the typewritten "Company Guarantee" must be held to control the provisions of the attached bulletin. This has been held even when the attached instrument was expressly made a part of the contract.

Daly v. Busk Tunnel Ry. Co., 129 Fed. 513, 518.

In the "Company Guarantee" it is stated: "There will be no suspended matter contained in the gas *which will be injurious to the engines or gas conducting pipes.*" As there is ample evidence in the record that the suspended matter existing in the gas produced by this apparatus would not injure the engines or pipes the burden of proof to show compliance with the guarantee in this respect has been fully met by the plaintiff. That the machinery would have failed to produce a result not required by the contract without further appliances has no bearing on the issue.

We respectfully submit that the evidence on this point of paramount importance—in fact the real issue of this case —was amply sufficient to require the submission of this case to the jury. The effect of the suspended matter in the gas upon the pipes and engines

was clearly a question of fact for the determination of the jury.

"The right of trial by jury is constitutional and is "not to be denied in an action at law where a material "question of fact remains in dispute. If there be sub- "stantial ground for doubt, the doubt should be re- "solved in favor of the right."

Nyback v. Champagne Lumber Co., 90 Fed. 774, 776.

See also

Richardson v. Swift & Company, 96 Fed. 699.

The failure of the defendant to comply with its contractual undertaking to furnish a 15,000 cubic feet gas holder is relevant on this question. As has been already stated, the purposes of a holder are manifold. A 15,000 cubic feet holder would not only have equalized the pressure upon the mains, thoroughly mixed the components of the gas, acted as a storage tank and as a means of measuring the gas but it would also have permitted the suspended matter in the gas to settle out of it [pp. 143, 156, 206, 237, 293]. The defendant supplied the plaintiff with a holder of only 5,000 cubic feet capacity [pp. 235, 271-2]. The only purpose a holder of that size could be used for in connection with this plant, of all the purposes for which a holder is designed, was to measure the gas [p. 235].

If the plaintiff had been furnished with a 15,000 cubic feet holder which would have performed all the functions of a holder the gas in question would have been much cleaner [p. 266]. Mr. Vorhees testified

that the scrubber or washer doesn't clean the gas entirely; that part of that function is transferred to the holder [p. 156]. Mr. Cox testified that he had planned to clean the gas by means of the holder [pp. 265-6]. He added: "I have in other plants that had really more than there was in that one used a holder to take the soot out of the gas." Mr. Cox also testified that in the larger holder more of the suspended matter would have been dropped than in the small holder actually provided [p. 205]. It is true that Mr. Cox a little later testified that the difference would not be very great [p. 206]. This testimony must, however, be taken with Mr. Cox's statement that there was only a small amount of suspended matter in the gas [p. 204].

Mr. Ensign testified that the function of the holder was to allow the suspended matter to settle [p. 293]. Mr. Ensign also testified that while it would be very difficult to say just how much suspended matter the larger holder would have removed, yet it would have done so to a very considerable degree [p. 290].

The defendant, having broken the contract by failing to supply plaintiff with the large holder for the tests, which fact was duly pleaded, will not be allowed to claim that the result of its breach cannot be shown under the allegation of performance contained in this complaint. The authorities hold that the defendant is estopped from denying performance in the respects to which failure was due to its own breach of the contract.

The effects of this duly pleaded breach of the defendant must therefore be considered on this appeal.

Smith v. Wetmore, 167 New York 234, 239;
General El. Co. v. Nat. Contracting Co., 178 N. Y. 369, 375;
Sexton v. Richardson, 6 Cal. App. 459, 92 P. 395.

We submit, therefore, that a verdict for the plaintiff must have been sustained, even though a strict and literal performance of the contract as to suspended matter had not been shown, which we do not admit.

In any event, the above facts must be considered in view of the common count contained in the amended complaint.

Crane Elevator Co. v. Clark, 80 Fed. 705.

We have dwelt at length on this subject because the court's opinion makes it manifest that the existence of the suspended matter and need of a sluicing system in order to remove absolutely all deposits from the pipes was the determining factor of his decision [p. 303].

The court lays stress on the clause of the contract whereby the machinery was guaranteed to properly perform the duty for which it is known to be intended [p. 303.] We submit this intention must be gathered from the contract itself. This clause certainly cannot be construed, particularly without a word of evidence to that effect, to vary and contradict the specific and exact language of the contractual guarantee, which clearly contemplated the existence of suspended matter not injurious to the engine or pipes.

The court states in his opinion that the plaintiff has failed to prove that the gas met the guarantees apart from the question of the suspended matter, and he adds that none of the plaintiff's witnesses made any analysis of the gas [pp. 303-4]. Mr. Cox, whose qualifications as an expert were admitted, testified that he had made a practical test of the gas by means of a tell-tale or burner [pp. 200-1]. He testified that by means of this test it is possible to tell within 10% approximately what the value of the gas would be; that this is the test usually employed and that it was uncommon to test the gas by exact analysis [pp. 201-2]. Mr. Cox also testified that as there was provision for testing only one producer and owing to the small size of the temporary pipe line furnished by the defendant he was not able to test the three units together but only one at a time [pp. 168, 194]. This subjected the test to more adverse conditions than would have prevailed if the three units had worked together [p. 198]. The question as to the horsepower of the plant and the quality of the gas as shown by these tests was not withdrawn as stated by the court, but owing to the constant interruptions by defendant's counsel Mr. Cox was unable to answer the question categorically [pp. 193-202]. However, as the result of this test, Mr. Cox was able to testify that the gas met the requirements of the contract [p. 266]. He stated further that he was present when the chemist made an exact analysis of the gas and took down the figures of the test, but he was not allowed by the court to testify to these figures [pp. 252-3]. However, other admissions of the defendant as to the quality of this

gas are in the record. Mr. Vorhees testified that defendant's chemist said to him and Mr. Cox and Mr. Douglas, defendant's assistant consulting engineer, that this gas "was a very good power gas." Mr. Ensign testified that either Mr. Douglas or Mr. Le Grand, the defendant's consulting engineer, in discussing the gas in question, stated "that the gas produced * * * was of such a kind that it made an ideal gas engine fuel." Mr. Smith testified that the only objection to the gas made by the defendant was as to the suspended matter and not as to its quality [p. 281].

As to proof of the horsepower of the plant, plaintiff offered the testimony of Mr. Cox as to whether the plant performed the functions of three 200 horsepower Amet Crude Oil Gas Producers, but the court refused to admit this evidence [pp. 208-212].

Mr. Cox testified that about May 6, 1913, Mr. Thompson, who was defendant's general manager, stated to him that there was too much suspended matter in the gas and that the gas must be cleaned better than it was being done at that time. In reply Mr. Cox said that the pipes could be cleaned of all deposits without interruption of the service by installing a system of sprays or sluices, or if the defendant desired the gas to be cleaned absolutely, a rotary washer had lately been installed at a plant at El Centro which would do the work. Mr. Thompson stated he would send Mr. Douglas to El Centro to examine the rotary washer that was installed there and after hearing Mr. Douglas's report would then let plaintiff know whether he would be willing to grant the extension of time necessary to obtain this rotary washer. On this understanding Mr.

Cox left for Los Angeles on May 7, 1913, and held himself in readiness to return to Morenci to continue with the 90 days' trial of the apparatus [pp. 189, 240-2, 262-3, 263-4, 265, 266]. Plaintiff's position was that the gas fulfilled the requirements of the contract, but in order absolutely to satisfy defendant they were willing to do more than the contract required [p. 266].

Mr. Smith, plaintiff's president, testified that they held a man in readiness to continue with the tests as soon as they heard from Mr. Thompson [pp. 275, 280]. However, about May 27, 1913, Mr. Thompson wired plaintiff that defendant did not desire to continue with the contract, and followed this up with a letter to the same effect [p. 274]. About a week later Mr. Thompson had a talk with Mr. Smith in Los Angeles, at which he stated that defendant had made other arrangements and had no longer any use for plaintiff's apparatus [pp. 191-2, 275-6, 280]. This clearly constituted a breach of the contract on the part of defendant.

Plaintiff had been and was at this time ready and willing to continue with the tests. Mr. Cox and Mr. Ensign testified for themselves that they had made the gas as clean as they could with the apparatus then at hand [pp. 235, 292]. Mr. Smith, who was plaintiff's president, testified that the plaintiff was ready to continue the tests as soon as it heard from defendant, not necessarily with a rotary washer, but after making some changes or perhaps introducing some other apparatus [pp. 275, 280]. In contrast with defendant's refusal to go on with the contract, there is absolutely no evidence that the plaintiff did anything which could be construed as a breach of the contract.

But the court decided that it nowhere appears in the evidence that defendant prevented plaintiff's "engineer Cox from continuing the experiments or efforts to perfect the plant as installed or to put it in a suitable condition to meet the requirements of the guarantees" [p. 304]. This is clearly erroneous. In the first place there is the testimony just alluded to of Mr. Smith, who was in general charge of this matter, as to plaintiff's willingness and readiness to continue the test. Then, as has been already shown, the plant met the requirements of the guarantees. Also, the object of the 90 days' test clearly was to enable the plaintiff to make any changes or additions to the machinery it might choose. The plaintiff was not confined to experiments with the plant as installed, as the court evidently thought. Moreover, the contract provides that the machinery "shall be as described in the manufacturer's bulletin *or of the latest improved design.*" Finally the evidence above referred to shows that plaintiff was induced to lie in wait till defendant had decided with regard to the rotary washer until about May 28, and that then, instead of being allowed to continue the tests as Mr. Smith testified it was ready to do apart from all question of the rotary washer, it was informed by defendant that they had no further use for the apparatus and had made other arrangements. We submit, therefore, that the court's decision that it nowhere appears in the evidence that the plaintiff was prevented from continuing the tests was certainly not warranted by the evidence.

"The parties to an executory contract have a right "to something more than that it shall be performed

"when the time arrives; they have a right to the main-
"tenance of the contractual relation up to that time as
"well as to the performance of the contract when due,
"and by weight of authority, if one of the parties re-
"nounce it before that time, the other is entitled to sue
"at once for the breach. In the leading English case
"the court based the doctrine on the ground that where
"there is a contract to do an act on a future day there
"is a relation constituted between the parties in the
"meantime by the contract and they impliedly promise
"that in the meantime neither will do anything to the
"prejudice of the other inconsistent with that relation."

9 Cyc. 635, 636.

There can be no question, therefore, that the court erred in directing a verdict. The plaintiff clearly proved that the machinery met the guarantees of the contract. The court's decision that the defendant had the right to decline to proceed under the contract before the expiration of the 90 days' trial is obviously erroneous in view of the above facts [p. 304]. This decision also clearly involved other issues of fact which should have likewise been left to the jury, namely, whether plaintiff abandoned the contract or would have been unable to perform it.

The right to a jury trial being a constitutional one, it is not to be denied except in a clear case. Moreover, upon a motion for a verdict, the view of the evidence most favorable to the party against whom the instruction was asked is to be taken. The plaintiff in this case should have been given the benefit of all the inferences reasonably and justifiably to be drawn from the evi-

dence. The above review of the evidence conclusively shows that so far from this being done the plaintiff was denied the clear effect of the evidence.

In the cast of Mount Adams E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, Justice Lurton, in delivering the opinion of the court, after an exhaustive review of the leading cases on the subject of a directed verdict, comes to the following conclusion:

"We do not think, therefore, that it is a proper test "of whether the court should direct a verdict that the "court, on weighing the evidence, would, upon motion, "grant a new trial. * * * In passing upon such "motions he is necessarily required to weigh the evi- "dence that he may determine whether the verdict was "one which might reasonably have been reached, but "in passing upon a motion to direct a verdict his func- "tions are altogether different. In the latter case "we think he cannot properly undertake to weigh the "evidence. His duty is to take that view of the evi- "dence most favorable to the party against whom it is "moved to direct a verdict, and from that evidence, "and the inferences reasonably and justifiably to be "drawn therefrom, determine whether or not under law "a verdict might be found for the party having the "onus."

To the same effect is the following excerpt from the opinion of the court in Estate of Arnold, 147 Cal. 586:

"Every favorable inference fairly deducible and "every favorable presumption fairly arising from the "evidence produced must be considered as facts proved

"in favor of contestant. Where evidence is fairly sus-
"ceptible of two constructions, or if either of several
"inferences may reasonably be made, the court must
"take the view most favorable to the contestant. If
"there be any substantial evidence tending to prove in
"favor of contestant on the facts necessary to make out
"their case they are entitled to have the case go to
"the jury for a verdict on the merits."

In the case of Goldstein v. Merchants Exchange & Cold Storage Company, 123 Cal. 625, the court said:

"A non-suit should be denied where the evidence and
"the presumptions reasonably arising therefrom are
"legally sufficient to prove the material allegations of
"the complaint."

In Zillner v. Gerichten, 111 Cal. 73, is found the following:

"A non-suit should be denied when there is any evi-
"dence to sustain plaintiff's case without passing upon
"the question as to the sufficiency of such evidence."

The opinion of the court in the case of Larsen v. Larsen, 15 Cal. App. 532, is, in part, as follows:

"A motion for a non-suit admits the truth of all
"evidence in favor of the plaintiff, together with every
"inference or presumption legitimately deducible there-
"from. Contradictory evidence must be disregarded,
"and upon such a motion all evidence must be construed
"most strongly against the defendant."

In Burr v. United Railroads, 163 Cal. 663, the court said:

"It is elementary that a motion for non-suit is not

"to be granted where there is any substantial evi-
"dence which, with the aid of all legitimate inferences
"favorable to the plaintiff, would support a verdict or
"finding that the material allegations of the complaint
"are true."

To the same effect are the following cases:

S. R. R. Co. v. Gadd, 207 Fed. 277;
Erie R. R. Co. v. Weber, 207 Fed. 293;
Tenn. Copper Co. v. Gaddy, 207 Fed. 297;
Worthington v. Elmer, 207 Fed. 306;
Liberty Bell Gold Mining Co. v. Smuggler Union Mining Co., 203 Fed. 795;
Bolton-Pratt Co. v. Chester, 210 Fed. 253;
Smith v. Baltimore & Ohio R. R. Co., 210 Fed. 414;
Hails v. Michigan Central R. R. Co., 200 Fed. 533;
Shank v. Great Shoshone & Twin Falls Water & Power Co., 205 Fed. 833;
Cascade Foundry Co. v. L. J. Mueller Furnace Co., 140 Fed. 791;
Nelson v. Ohio Cultivator Co., 188 Fed. 620, 629;
Phoenix Assur. Co. v. Lusker, 77 Fed. 243;
Travellers Ins. Co. v. Randolph, 78 Fed. 754;
Texas Pacific Ry. Co. v. Cox, 36 L. Ed. 829;
Balzer v. Warring, 95 N. E. 257, 261 (Ind.);
Ardison v. Illinois Central R. R. Co., 249 Ill. 300, 302;
Hobbs v. Ray, 96 S. W. 589 (Ky.);
McLean v. Dow, 125 Ill. App. 174, 177;

Lorne v. Yeoman, 125 Ill. App. 406;
Kimball Co. v. Crinckshank, 123 Ill. App. 580;
Skud v. Tellinghast, 195 F. 1, 6.

Moreover, the court fell into error in deciding that the plaintiff had to prove upon the trial that the machinery met each and all of the guarantees specified in the agreement [p. 299]. We have seen that the defendant's failure to provide plaintiff with a large holder affected the amount of suspended matter in this gas, and that defendant is estopped from denying performance of the contract in this respect; though, we submit, performance was in any event amply shown. Likewise, as to the guarantees of quality and quantity of the gas, which were the only other points that the court held had not been sufficiently covered by proof [pp. 303-304]. It was duly pleaded and the evidence was undisputed that defendant refused to permit plaintiff to proceed with the test long before the expiration of the period of ninety days. We submit that in view of this end and the evidence above referred to amply showing, at the very least, substantial performance, defendant is estopped from requiring a literal and absolutely exact proof of performance in every patricular.

Smith v. Wetmore, 167 New York 234, 239;
General Elec. Co. v. National Contracting Co., 178 New York 369, 375;
Sexton v. Richardson, 6 Cal. App. 459, 92 Pac. 395.

In view of the proof we submit that the court should have allowed this case to go on. Under the strictest

interpretation of the effect of the evidence produced the plaintiff proved substantial performance of the contract. Under the circumstances of this case as set forth in the proof the doctrine of substantial performance applies. The jury should have been allowed to decide whether there was substantial performance. Substantial performance is performance and entitles the plaintiff to recover under a complaint alleging performance.

"The jury having found that the plaintiff did his "work substantially according to the contract, a suffi- "cient compliance therewith on his part was compe- "tently ascertained. 'The rule is that a substantial per- "formance must be established to entitle the party "claiming the benefit to recover, but this does not "mean a literal compliance as to all details.' Desmond- "Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, "56 N. E. 995; McCartan v. Inhabitants of Trenton, "57 N. J. Eq. 571, 41 Atl. 830. 'Whether * * * "alleged defects are substantial or unimportant is a "question of fact for the jury. Substantial perform- "ance of the entire contract is sufficient and the jury "may properly so find.' Pitcarn v. Phillips-Hiss Co., "113 Fed. 483."

City of Elizabeth v. Fitzgerald, 114 Fed. 547, 549.

See also

Springfield Milling Co. v. Barnard & L. Mfg. Co., 81 Fed. 261, 266;

Pitcairn v. Philip Hiss Co., 113 Fed. 492, 496-497;

Thomson-Houston Elec. Co. v. Brush-Swann E. L. & P. Co., 31 Fed. 535;

Rowe v. Gerry, 112 App. Div. 368, affirmed 188 N. Y. 625;

Omaha Water Co. v. Stewart, 206 Fed. 448, 449;

Blakely v. J. Neils Lumber, 141 N. W. 179, 180 (Minn.);

Chambers v. Jaynes, 4 Pa. St. 39.

II.

The Court Erred in His Rulings in Admitting and Excluding Evidence.

We respectfully submit that the court committed numerous errors in the admission and exclusion of evidence at the trial which were seriously prejudicial to the plaintiff, and which require the reversal of the judgment.

A. Exclusion of evidence as to similar plants. (Assignment of Errors, Error I.)

The contractual guarantee relating to suspended matter in the gas was not that there would be none, but that it would not be injurious to the defendant's engines and pipes [p. 319]. It was obviously, therefore, of the first importance that the plaintiff prove that the suspended matter in the gas generated in the plant at Morenci was not injurious to the engines and pipes of defendant. Plaintiff endeavored to do this by eliciting testimony from its witnesses Cox and Ensign that "the gas produced by other plants

exactly similar to the plant in question operating under the same conditions and producing similar gas did not act upon the pipes and engines connected therewith in a manner injurious to them" [pp. 53-61, 159-162, 207-8, 284-9]. The court sustained the objections of the defendant to this evidence and excluded it. This was clearly error.

Wigmore on Evidence, 451, says:

"In this way may be evidenced * * * the ten-"dency or quality of tools, weapons, vehicles, acids and "other materials, as indicated in their effects upon sim-"ilar substances under similar conditions; and of the "tendency of a machine or apparatus, as shown by "other instances of its operation under similar circum-"stances, to operate defectively or otherwise (for in-"stance, in actions for breach of warranty or personal "injury); here the working of other similar machinery "(tools or apparatus) would equally be receivable, pro-"vided the conditions were similar and a confusion of "issues were not involved."

Avery v. Burrall, 77 N. W. 272;

Indiana N. & I. G. Co. v. Anthony, 58 N. E. 868, 872;

Delaney v. Framingham G. F. & P. Co., 88 N. E. 773, 775, 202 Mass. 359;

Davis v. Oakland Chem. Co., 121 Ap. Div. 242 (N. Y.).

B. Exclusion of expert evidence of performance. (Assignment of Errors, Error II.)

Witness Cox was plaintiff's salesman engineer and conducted the tests on behalf of plaintiff and operated the apparatus [pp. 159-160]. His testimony shows that his knowledge of this plant was intimate and extensive. Moreover, his qualifications as an expert were admitted by defendant [pp. 163, 206]. The contract stated that the plaintiff would furnish defendant with three 200-horsepower International Amet Crude Oil Gas Producers [p. 317]. In order to prove performance of the contract in this respect plaintiff asked Mr. Cox whether the apparatus as installed properly performed the functions of a three 200-horsepower International Amet Crude Oil Gas Producer. The court sustained defendant's objection to this evidence and excluded it [pp. 62-64, 209-212]. This, we submit, was error. Particularly is this true in view of the contractual provision: "It is understood and agreed that any machine the company may furnish is properly to perform the duty for which it is known to be intended by the parties." Obviously this intention must be ascertained from the contract. If, therefore, plaintiff was to furnish three such producers it must have been intended that they perform the functions of such producers, and Mr. Cox was qualified to prove this. Defendant's contention that this was one of the questions for the jury

and therefore not a proper subject for expert evidence, has no weight.

Western C. & M. Co. v. Barberich, 94 Fed. 329, 331-333;
St. Louis I. M. & S. Ry. Co. v. Edwards, 78 Fed. 745, 746;
Sheldon v. Booth, 50 Iowa 209;
Ward v. Kilpatrick, 85 N. Y. 413, 416;
Hood v. Diston, 90 Ala. 377, 7 Sout. 782.

C. Exclusion of evidence of circumstances existing at the time defendant refused to go on with the contract and of performance. (Assignment of Errors, Error III.)

The plaintiff offered the testimony of its witness Cox to show the circumstances attending his leaving Morenci about May 7, 1913. For this purpose plaintiff's counsel propounded a question to this witness regarding a conversation had by him and Mr. Ensign with defendant's consulting and assistant consulting engineers [pp. 169-185]. The object of this evidence, as shown by the long colloquy between counsel of the parties and the court in the absence of the jury, was to show that while plaintiff had fully performed the contract it was endeavoring to satisfy the defendant even beyond the contractual requirements [pp. 169-185]. More specifically it was to show that on being told that there was too much foreign matter in the gas by defendant's engineers, Mr. Cox replied that a rotary washer like the one installed at El Centro would clean the gas absolutely. The engineer agreed to take this up with Mr. Thompson, defendant's general manager.

Mr. Thompson next day agreed with Mr. Cox that he would send an engineer to El Centro to examine the work of the rotary washer and if his report was favorable, defendant would grant such extension of the 90 days' test as might be necessary for the installation of this apparatus at Morenci. As defendant's amended answer put in issue the question whether plaintiff had performed or had abandoned this contract, this proof tending to show that plaintiff did not abandon the contract but had made arrangements to return and continue the tests is extremely important, and the court's exclusion of it was prejudicial error [pp. 66, 77, 169-185].

We submit, moreover, with regard to the long colloquy held by counsel and the court in the absence of the jury, that the plaintiff was at least entitled to have the evidence then adduced and discussed and the inference deducible from it weighed and considered by the jury and not by the court.

Error was also committed by the court in striking out on defendant's motion Mr. Cox's testimony that he left Morenci to await the result of the inspection of the El Centro plant by the representatives of both companies [pp. 77-8, 97-8]. The court also erred similarly in excluding so much of Mr. Cox's conversation with Mr. Thompson as related to the rotary washer and the proposed extension of time [pp. 167-173, 186-193]. We submit that plaintiff could not be required to rest its case with the bare testimony that Mr. Cox left Morenci without showing why he left, in view of the issues raised by the pleadings. There is no question here of

a modification of the contract. All this evidence should have been admitted.

Chapman v. Kansas City C. & S. Ry. Co., 146 Mo. 481, 48 S. W. 646;

Rogers B. & Co. v. Hart, 106 Ill. App. 393;

Texas S. F. & N. Ry. Co. v. Saxton, 7 N. M. 302, 306, 34 Pac. 532;

Raven v. Smith, 87 Hun. 90, 92, 94 Sup. Ct. Rep. N. Y. 90, 92.

D. Exclusion of evidence relating to the test. (Assignment of Errors, Error IV.)

The court excluded the testimony of Mr. Cox relating to statements made by Dr. Sanberg, defendant's chief chemist, as to the result of tests made by him of the gas in question. Defendant's general manager advised Mr. Cox that Dr. Sanberg was there for the purpose of making the tests. Dr. Sanberg's statement would therefore have been an admission binding on defendant. The court erred in excluding this evidence [pp. 202-3]. The court also erred for a similar reason in excluding Mr. Cox's evidence as to the figures of the test he saw Dr. Sanberg write down [pp. 252-3]. These admissions would have tended to prove performance of the guarantees as to the qualify of the gas by the appellant, and exclusion of them is therefore prejudicial error.

Rahm v. Deig, 121 Ind. 283, 289, 23 N. E. 141;

McPherrin v. Jennings, 66 Ia. 622.

Plaintiff offered to prove by witness Cox that it was unable to make a test of the gas in exactly the manner

provided for by the contract because of defendant's failure to furnish the 15,000 cubic feet gas holder provided for by the contract. Plaintiff then offered to prove what tests were made, and how the witness determined that the gas was of the quality required by the contract, and also the difference in the consistency of the quality of the gas after passing through the 5000 cubic feet holder and the 15,000 cubic feet holder. Mr. Cox's qualifications to answer such questions were admitted. Yet the court excluded all this evidence [pp. 194-198, 203, 86-90]. This, we submit, was error. It is difficult to see how plaintiff could be expected to prove its case without eliciting testimony of this nature. At paragraph V of the complaint the defendant's failure, in violation of the contract, to supply a holder large enough for any other purpose than measuring the gas was duly pleaded. The defendant is, therefore, estopped from requiring a full and exact proof of performance of the contract in the respects affected by its own failure to comply with the contract. We submit consequently that plaintiff is entitled to show just what effect defendant's breach of the contract had.

Smith v. Wetmore, 167 New York 234, 239;
General Elec. Co. v. National Contracting Co., 178 N. Y. 369, 375;
Sexton v. Richardson, 6 Cal. App. 459, 92 Pac. 395.

Moreover, we submit in any event that plaintiff was entitled to show the changes necessitated in the test by reason of defendant's breach of its undertaking to supply a large gas holder.

Hubbard v. Chapman, 54 N. Y. Suppl. 527, 531.

E. Exclusion of evidence as to effect of suspended matter. (Assignment of Errors, Error V.)

Plaintiff proposed to show by expert testimony that the deposits in the pipes from the suspended matter in the gas could be removed by ordinary cleaning of the pipes. The defendant objected that the contract did not provide that there should be any sluicing of the pipes. The court sustained the objection and excluded this evidence. We respectfully submit that this was error because the guarantees of the contract, which govern on this point, clearly contemplated the existence of suspended matter, and the contract itself did not purport to cover anything but the gas plant [p. 91]. Therefore, the fact that cleaning of the pipes was not specified is of no significance.

F. Erroneous admissions of evidence as to intention of the parties. (Assignment of Errors, Error VI.)

The defendant propounded to plaintiff's witness Cox a long series of questions relating to the purpose for which the parties intended this gas plant. As the basis of this testimony as to intention, Mr. Cox was first required to testify to the physical conditions near the gas plant [pp. 92-95, 213-14]. Then evidence was evoked that the gas made by the defendant's existing plant at that time was made from coal, and that it was hoped by plaintiff that if the plant in question in this action was a success it would be enlarged and would supplant the defendant's then existing plant [pp. 95-98, 214-218].

The court then excluded evidence of a letter written to plaintiff by defendant's general manager, dated November 25th, 1912, which defendant claimed showed the purpose of the installation [pp. 219-220]. The court also struck out a question based in terms upon that letter and the answer evoked thereby, after having first admitted it [pp. 219-223]. These last two rulings were obviously correct, for the contract sued upon is a written contract and as it clearly set forth its object and purposes it can alone be referred to.

However, immediately afterwards the court admitted testimony of Mr. Cox to the effect that the object of the installation of this plant was to produce gas of a commercial value to operate the concentrator mining machinery of defendant *with greater economy than was possible with gas made from coal* [pp. 223-4].

All these questions and evidence were objected to by plaintiff on the grounds that they were not proper cross-examination, were wholly immaterial and incompetent, that they tended to vary and contradict the terms of a written contract in evidence in the case, the object and purposes of which were clearly set forth therein and which contained no reference to the matters thus testified to [pp. 214-25] . It was error to admit this evidence.

The fact that plaintiff on direct examination elicited from Mr. Cox testimony that the functions the parties intended this apparatus to perform were to manufacture gas to operate certain engines and a concentrator near the gas plant, does not affect the obvious error of these rulings of the court. The contract guaranteed that this machinery would "properly perform the duty for which

it is known to be intended by the parties." Plaintiff's position is that the intention of the parties is to be ascertained from the contract. The court, however, would not permit plaintiff to ask Mr. Cox questions relating to the functions of the apparatus based on clauses of the contract. It was not till then that plaintiff entered into the question of the intention of the parties. We submit that this did not open the way to defendant to add to this written contract guarantees and provisions it does not contain.

Again, defendant was permitted to cross-examine Mr. Cox as to the probable effect on the existing gas plant of permitting plaintiff to use the 15,000 cubic feet gas holder for its tests. The purpose of this cross-examination was avowedly to show that if the then existing 15,000 cubic feet gas holder had been turned over to the plaintiff for the tests it would have resulted in the shutting down of the operations of the defendant. In view of the specific contractual obligation on the part of the defendant to furnish a 15,000 cubic feet holder, and the provision that the samples of gas for the test were to be taken from the main after leaving the holder—the holder described in the contract being obviously the one referred to—the irrelevancy of this testimony is apparent [pp. 228-231]. The difficulty defendant would have had to comply with its contractual obligation is immaterial. Parties can make binding obligations to do what turns out to be difficult, troublesome or expensive.

Wald's Pollock on Contracts (3d Am. Ed.) 522.

G. Erroneous admissions of conversations of Mr. Cox with defendant's employees. (Assignment of Errors, Errors VI and VII.)

The court allowed defendant to ask Mr. Cox on cross-examination concerning conversations had by him with two of defendant's engineers [p. 233]. The purpose of this evidence, as shown by the statement of defendant's counsel, was to show an admission binding on the plaintiff [p. 230]. As Mr. Cox was merely plaintiff's sales engineer and had not sufficient authority to bind plaintiff, the court admitted this evidence only as going to the witness' credibility [p. 234]. As, however, this conversation had not been referred to on direct examination and no foundation for its admission as impeaching the witness had been laid, we submit the ruling was erroneous.

For the same reason the court erred in permitting defendant's counsel to question Mr. Cox as to an alleged statement of his that the small holder would be satisfactory [pp. 237-8].

The defendant was also allowed to ask Mr. Cox with regard to his conversation with Mr. Thompson about the installation of a rotary washer [p. 240]. This was obviously not proper cross-examination as the plaintiff's questions as to this very conversation had been excluded on the direct examination of this witness [pp. 187-189].

"The rule has long been settled that the cross-exami-
"nation of a witness must be limited to the matters
"stated in his direct examination. If the diverse party
"desires to examine him as to other matters he must

"do so by calling the witness to the stand in the sub-
"sequent process of the cause. Phil. & T. Rr. Co. v.
"Stimpson, 14 Pit. 461; Greenleaf Evidence 445."

Houghton v. Jones, 1 Wall. 702, 706.

See also

Philadelphia & T. Rr. Co. v. Thompson, 14 Pct. 448.

Similar error was committed by the court with regard to defendant's exhibit 6 and the cross-examination of Mr. Cox thereon. This letter was written by Mr. Cox to the defendant and related to the proposed installation of a rotary washer. The plaintiff had not been allowed to examine Mr. Cox with regard to this matter [pp. 98-100]; clearly, therefore, this letter was inadmissible as improper cross-examination, for the witness could not be contradicted on a matter he did not testify to. The record shows that this letter was admitted for the purpose of going to the witness' credibility [p. 245]. We submit this was error as there was no proper foundation laid for the impeachment of the witness, and it was not offered for that purpose. However, the court stated that he had not admitted this letter. At all events the court allowed defendant to ask Mr. Cox questions which were really, and were stated to be, lengthy extracts from this letter [pp. 246-250]. This procedure was not only erroneous for the above reasons, but also for the reason that these questions were based avowedly on a letter not in evidence.

The same error was committed by the court in admitting the conversations of Mr. Cox with Mr. Le

Grand and Mr. Thomson [pp. 249-251]. We submit the defendant will not be allowed to test the witness' credibility by asking him questions as to matters ruled out on direct examination and without laying any foundation. This witness was the defendant's witness as to these matters.

H. Erroneous admission of evidence regarding the gas holders. (Assignment of Errors, Error VI.)

The defendant was allowed to ask Mr. Cox on cross-examination whether in his opinion a 15,000 cubic feet holder was required by this plant. In view of the specific contractual obligation on the part of defendant to furnish a holder of that size the admission of this testimony was clearly erroneous [pp. 267-8, 112-13]. In the same way the court erred in permitting defendant to ask this witness as to his opinion regarding the sufficiency of the storage capacity of the larger holder [p. 268]. Mr. Cox's opinion on this subject was without relevancy.

Crane Co. v. Columbus Const. Co., 73 Fed. 984, 989.

The court also erred in permitting the cross-examination of Mr. Cox as to the contents of the manufacturer's bulletin [pp. 269-270]. The purpose of this cross-examination was evidently to attempt to minimize the importance of the 15,000 cubic feet holder. We submit, however, that the typewritten part of the contract designated "guarantee" must control the manufacturer's bulletin, as shown above.

Daly v. Busk Tunnel Ry. Co., 129 Fed. 513, 518.

The court's admission of the evidence as to the reason why the size of the holder was fixed at 15,000 cubic feet was also error. The reason was, of course, immaterial in view of the contractual provision.

I. Erroneous exclusion of testimony as to the limits of Mr. Cox's authority. (Assignment of Errors, Error VIII.)

The plaintiff's counsel endeavored to elicit from Mr. Smith, who was plaintiff's president, testimony with regard to the exact nature of Mr. Cox's employment and the limits of his authority to represent plaintiff. This evidence was excluded [pp. 276-277]. In view of defendant's attempt to show that Mr. Cox was in all things the representative of the plaintiff and that his statements were binding as admissions on plaintiff, the relevancy of this evidence is clear.

Lyons v. Thompson, 16 Iowa 62;
31 Cyc. 1658.

Under this point we have discussed errors I to VIII, set forth in the assignment of errors. These errors relate to the admission and exclusion of evidence. We strongly submit that these errors were seriously prejudicial to the plaintiff and greatly hampered it in proving its case.

III.

The Court Erred in Excluding Testimony Offered to Prove the Second Cause of Action for Goods, Wares and Merchandise Sold and Delivered.

(Assignment of Errors, Error IX.)

The plaintiff endeavored to elicit from its witnesses Cox and Smith evidence in proof of the second cause of action contained in the complaint for goods, wares and merchandise sold and delivered. The court excluded this evidence [pp. 127-128, 259-261, 273-4]. This we submit was error, as shown by the authorities.

In Katz v. Bedford, 77 Cal. 319, 19 Pac. 523, the plaintiff had counted upon a written contract and the common count and it was held that he could recover on the latter.

In Cowan v. Abbott, 92 Cal. 100, 28 Pac. 213, it was held that a plaintiff could join a count upon an express contract and a count upon a *quantum meruit,* and will not be required to elect between them.

Wilson v. Smith, 61 Cal. 209;

Hunter v. Vicario, 146 App. Div. (N. Y.) 93, 97;

Intendant v. Pippin, 31 Ala. 542;

City of St. Charles v. Stookey, 154 Fed. 772, 776.

That these authorities are binding on this case brought in the District Court of Arizona appears from the case of Pringle v. Hall, 6 Ariz. 284, where it was held that the Arizona Code of Procedure not only per-

mitted but encouraged the combination of actions arising out of the same transaction.

It appears fully from the record that plaintiff substantially performed at the very least. The defendant, on the other hand, broke the contract in three respects: namely, in failing to provide plaintiff with a large gas holder to conduct the tests, in refusing to go on with the tests when a little over a third of the time provided by the contract had expired and in not paying for the apparatus. Under these circumstances it is submitted that the above authorities control this case, and that the court in limiting plaintiff to the first count on the express contract fell into error.

IV.

The Motion for a New Trial Should Have Been Granted.

The plaintiff made a motion for a new trial for all the reasons set forth in the assignment of errors and discussed above. The court denied the motion. This was error. (Assignment of Errors, Error XVI.)

We submit that the record shows that there was ample evidence which required the submission of the case to the jury, and the evidence received was sufficient to support a verdict for the plaintiff rendered upon it. It would have been reversible error to set aside such a verdict.

We regard it, moreover, as beyond dispute that much evidence of a competent and material character was erroneously excluded by the court, which if admitted would have established even more clearly the plaintiff's plain right to have this case considered and deter-

mined by the jury. In effect the learned court first refused to receive the competent evidence of the plaintiff and then determined adversely to it the questions and inferences of fact clearly presented by the evidence which remained, and dismissed the plaintiff for an alleged failure of proof. If this failure existed at all, which we deny, it resulted only from the erroneous rulings of the learned court and from his unauthorized assumption and exercise of the functions of the jury.

We think it clear that reversal must follow and we respectfully pray that the judgment be reversed with costs, and that a new trial be granted.

Respectfully submitted,

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San Francisco, Cal., October ..., 1914.